

RECEIVED

JUN 14 1994

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

94-123

In the Matter of )  
)  
Petition for Declaratory )  
Ruling, filed by First )  
Media Corporation )  
)  
Application for Review, )  
filed by Channel 41, Inc. )  
)  
Petition for Rulemaking, )  
filed by Hubbard )  
Broadcasting, Inc. )

MMB File No. 900418A

MMB File No. 870622A

MMB File No. 920117A

COMMENTS OF CBS INC.

Ellen Oran Kaden  
51 W. 52 Street  
New York, NY 10019

Mark W. Johnson  
1634 I Street, N.W.  
Washington, D.C. 20006

Its Attorneys

June 14, 1994

## TABLE OF CONTENTS

A. Introduction And Summary.....	2
B. The Commission Should Proceed Promptly To Adopt A Notice Of Proposed Rulemaking To Repeal The Off-Network Restriction Of PTAR.....	5
C. A Notice Of Proposed Rulemaking To Repeal The Off-Network Restriction Need Not And Should Not Await The 1995 Fin/Syn Proceeding.....	11
D. The First Amendment Implications Of The Off-Network Restriction Strengthen The Case For Its Repeal.....	13
E. Conclusion.....	14

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory	)	MMB File No. 900418A
Ruling, filed by First	)	
Media Corporation	)	
	)	
Application for Review,	)	MMB File No. 870622A
filed by Channel 41, Inc.	)	
	)	
Petition for Rulemaking,	)	MMB File No. 920117A
filed by Hubbard	)	
Broadcasting, Inc.	)	

COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits its comments in response to the Commission's April 12, 1994 Public Notice entitled Petitions, Applications and Related Pleadings Regarding the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules ("Public Notice"). In the Public Notice, the Commission notes the pendency of the above-captioned application and petitions filed by licensees of network-affiliated broadcast stations and "seeks comments on these requests and the responsive and associated pleadings that have been filed in connection with them." First Media Corporation seeks a declaratory ruling that the prime time access rule ("PTAR", or "Section 73.658(k)") is

unconstitutional in its entirety.<sup>1</sup> The applicant and petitioner in the other two captioned matters seek a rulemaking to repeal only the provision of PTAR under which off-network syndicated programming is counted toward PTAR's general three-hour limitation on prime time network programming ("off-network ban" or "off-network restriction").<sup>2</sup>

#### A. Introduction And Summary

The Public Notice was presaged and explained in the Commission's response to an order of the U.S. Court of Appeals for the D. C. Circuit, in which the Court requested the Commission's views on First Media's claim that the Commission should be required to act on the long-pending and apparently dormant First Media Petition.<sup>3</sup> The Commission advised the Court that it had delayed acting on the pending requests for relief from PTAR until after it completed

---

<sup>1</sup> Petition for Declaratory Ruling, filed by First Media Corporation, MMB File No. 900418A (April 18, 1990) ("First Media Petition").

<sup>2</sup> Application for Review filed by Channel 41, Inc., MMB File No. 870622A (June 22, 1987) ("Channel 41 Application"); Petition for Rulemaking, filed by Hubbard Broadcasting, Inc., MMB File No. 920117A (January 17, 1992) ("Hubbard Petition").

<sup>3</sup> Order, In Re: First Media, L.P., No. 94-1080 (D.C. Cir. March 2, 1994).

action on the financial interest and syndication rules,"<sup>4</sup> but would now invite public comment on those requests, including the First Media Petition.

According to the Commission, the opportunity for comment promised to the Court, and now offered by the Public Notice, is "an important first step" in the reevaluation of PTAR, after which it will "consider initiating a proceeding to assess the continuing need for the ... rule."<sup>5</sup> The Commission also suggested to the Court that it may coordinate any such proceeding with the proceeding it expects to begin in May 1995 to review the remaining financial interest and syndication rules.<sup>6</sup>

For reasons summarized below, CBS believes that the Commission should proceed without further delay to repeal the off-network restriction of PTAR. We think it is inappropriate for the Commission to wait until mid-1995 to commence -- or, indeed, to finish -- the requisite

---

<sup>4</sup> Answer of Federal Communications Commission to Petition for a Writ of Mandamus, In Re: First Media, L.P., No. 94-1080 (D.C. Cir. March 23, 1994) ("FCC Answer"), at 4.

<sup>5</sup> Id at 9.

<sup>6</sup> Id at 9.

rulemaking proceeding. As the Commission itself has previously repeatedly determined, "coordination" of that rulemaking with the proceeding in which the vestigial fyn/syn rules will be reviewed yet again is unnecessary and unwise.

CBS agrees with Channel 41, Inc. and Hubbard Broadcasting Inc. that, in today's marketplace, the off-network ban amounts to constitutionally impermissible regulation under which "the Commission imposes its choice as to what class of speech some stations might select."<sup>7</sup> However, we do not concur in First Media's view that the Commission should rule "solely on the constitutional issue," either as it relates to PTAR in general or to the off-network restriction, as the basis for repeal of the rule. In our view, the economic policy justification for reform of PTAR is so powerful and incontrovertible that it is unnecessary for the Commission to reach the constitutional issues which are the focus of the First Media Petition. We also differ with First Media Petition in that we believe the off-network ban is severable from PTAR in general and can appropriately be considered on a faster track.

---

<sup>7</sup> Channel 41 Application at 4-6. See also, Hubbard Petition at 22-28.

B. The Commission Should Proceed Promptly To Adopt A Notice Of Proposed Rulemaking To Repeal The Off-Network Restriction Of PTAR.

CBS believes that the Commission should immediately grant the Hubbard Petition and the Channel 41 Application, and commence an expedited rulemaking proceeding looking toward the elimination of the off-network provision of Section 73.658(k).<sup>8</sup> While we have no objection to a reassessment of the need for the rule in its entirety, we also believe that the off-network provision is severable from PTAR as a whole, and that the case for its elimination is especially compelling, straightforward and well-documented.<sup>9</sup>

---

<sup>8</sup> Section 73.658(k) now provides in pertinent part:

"[C]ommercial television stations owned by or affiliated with a national television network in the 50 largest television markets ... shall devote, during the four hours of prime time ..., no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) other than feature films or, on Saturdays, feature films ... ." (Emphasis supplied)

<sup>9</sup> The basic "three-hour" limitation of PTAR is aimed at regulating the relationship between broadcast networks and their affiliates by limiting the amount of prime time programming that can be supplied to those affiliates using the national network distribution system. As such, it is a relative of the ancient "chain broadcasting" regulations codified in §73.658 of the Commission's Rules that continue to regulate networks' contractual relationships with their  
(continued...)

The Commission already has the benefit of an extensive factual and legal record justifying prompt repeal of the off-network ban. CBS will not repeat here either the exhaustive and persuasive arguments made by network-affiliated station licensees in the Hubbard Petition and in the petition for rulemaking which is the subject of the Channel 41 Application,<sup>10</sup> or the detailed arguments CBS made in favor of repeal of the off-network provision in our comments in the Commission's 1991 video marketplace inquiry.<sup>11</sup> We will, however, take the opportunity presented at this preliminary stage to emphasize certain fundamental propositions developed in those pleadings that should lead

---

<sup>9</sup>(...continued)  
affiliates. The Final Report of the Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation (1980) ("Network Inquiry Final Report") provides a sound analytical basis -- strengthened by the profound marketplace changes since its issuance -- for a separate overall review of the continued need for government intervention in the network/affiliate relationship.

<sup>10</sup> Petition for Rulemaking, filed by Channel 41, Inc., MMB Docket No. 879622A, (April 24, 1987) ("Channel 41 Petition").

<sup>11</sup> Notice of Inquiry, MM Docket No. 91-221, 6 FCC Rcd 4961 (1991) ("Video Marketplace Inquiry NOI"). The Comments Of CBS Inc. in that proceeding at 56-76 urge repeal of PTAR's "off-network" provision, and we respectfully request that those comments be incorporated by reference in the record of this proceeding.



the Commission to proceed quickly to a rulemaking to review the restriction.

In brief, those propositions are: first, that the off-network ban was ill-considered from the very beginning; second, that marketplace changes since 1970 have removed any possible justification for the restriction; and third, that in its operation today, the ban has the blatantly protectionist and anticompetitive effects of limiting affiliates' program choices and unnecessarily perpetuating a captive market for the very few large first-run syndicators who provide the bulk of the programming in the "prime time access period," and who would undoubtedly continue to thrive in a more competitive environment.<sup>12</sup>

As the Channel 41 Petition notes, the off-network restriction was adopted almost a quarter-century ago without the benefit of any record evidence as to its need or likely effects. Rather, the Commission simply assumed that the ban was necessary to allow the first-run syndication market to

---

<sup>12</sup> Another anticompetitive effect of the "off-network" restriction is the artificial elevation of the price that networks must pay to their prime time program suppliers for network exhibition rights. Comments of CBS Inc, Video Marketplace Inquiry NOI at 59 et seq.

flourish in the context of the "network dominance" that had been historically cited to justify direct regulation of network structure and behavior.<sup>13</sup> What Chairman Burch said in dissent at that time deserves emphasis now:

"[T]he Commission today has no data whatsoever as to the economic impact of [the off-network restriction]... . [E]conomics is really what this rule is all about, and the Commission should at least have had up-to-date information in this field before acting."<sup>14</sup>

Certainly, intrusive economic regulation that was guesswork when it was adopted 24 years ago should be especially suspect in light of the well-documented transformation of the video marketplace.

It is surely unnecessary to conduct another full-scale inquiry to demonstrate that today's marketplace is dramatically different, and that the concept of "network dominance" may no longer be invoked instinctively or otherwise as a rationale for propping up the first-run syndication industry. Many of the most relevant marketplace changes up until 1992 were catalogued in the Hubbard Petition at pages 11-20. Of course, the Commission itself has developed such data on the video marketplace in

---

<sup>13</sup> Channel 41 Petition at pages 5-6.

<sup>14</sup> Report and Order, 23 F.C.C. 2d 382, 415 (1970).

general, and on the network television economic environment in particular, in a variety of proceedings since 1980.<sup>15</sup> These changes are undeniable and accelerating. A new rulemaking notice could quickly and easily elicit whatever new or updated economic information the Commission deemed necessary to reach a policy judgment on the particular syndication marketplace issues involved in off-network repeal.

The final fundamental proposition CBS would emphasize at this preliminary stage is that, in its application in the current market environment, the off-network restriction is not a harmless regulatory relic, but has blatantly perverse effects. As the Channel 41 Petition notes, the rationale most recently expressed for PTAR in general is that it guarantees affiliates an opportunity during a portion of prime time to "present programs in light of their own judgments as to what would be responsive to the needs,

---

<sup>15</sup> Network Inquiry Final Report (1980); OPP Working Paper, Broadcast Television In A Multichannel Marketplace, 6 FCC Rcd 3996 (1991); Video Marketplace Inquiry NOI, 6 FCC Rcd 4961 (1991); Second Report And Order, MM Docket No. 90-162, 7 FCC Rcd 3282 (1993) ("1993 Fin/Syn Order").

interest and tastes of their communities."<sup>16</sup> In fact, the off-network restriction has always had precisely the opposite effect, limiting affiliates' programming judgments in the top-50 markets and presumptively limiting their choice of community-responsive programming. Indeed, the principal practical effect of the off-network ban today is to perpetuate by government fiat a lucrative prime time enclave on major market network-affiliated television stations for the game shows and "reality" programming -- mainly distributed by King World and Paramount -- which have become the staples of access period programming.<sup>17</sup>

In fact, affiliates in markets 51-75, unrestrained by the off-network restriction, rely by choice mainly on the first-run syndicated programming from these same distributors, belying any claim that repeal of the ban would threaten the existence or the profitability (as opposed to the guaranteed market) of current syndication companies.<sup>18</sup>

---

<sup>16</sup> Channel 41 Petition at 7, citing Second Report and Order, Docket No. 19622, 50 F.C.C.2d, 829, 835 (1975).

<sup>17</sup> King World or Paramount were the distributors of six of the eight highest rated first-run syndicated programs broadcast in the prime time access period by network affiliates in the top-50 markets in February 1994. (Source: Nielsen Station Index)

<sup>18</sup> Electronic Media, April 18, 1994 at 1.

It is a safe assumption that top-50 market affiliates, when liberated from this constraint, would also continue to be major purchasers of first-run syndicated product for "access period" programming if a competitive marketplace were permitted to exist.

The difference between top-50 market affiliates and others, according to the general manager of WBAY-TV in Green Bay, Wisconsin, the 65th largest television market, is simply that he "can take every show and look at it on its merits, based on what our needs and goals are, and then program that half-hour or hour based on that."<sup>19</sup> There is no supportable public policy rationale for precluding top-50 market affiliates from approaching their programming responsibilities in the same way.

C. A Notice of Proposed Rulemaking To Repeal The Off-Network Restriction Need Not And Should Not Await The 1995 Fin/Syn Proceeding.

The FCC Answer to the Court of Appeals suggested that the Commission may coordinate "any subsequent rule making to modify or repeal [PTAR] ... with the proceeding that is presently scheduled to commence in May 1995 to examine

---

<sup>19</sup> Id.

whether the closely related financial interest and syndication rules should remain in effect beyond November 1995 when they are scheduled to expire."<sup>20</sup>

At every stage of its most recent review of the fin/syn rules, the Commission has stated unequivocally that it would not revisit PTAR in the context of the fin/syn proceeding.<sup>21</sup> For example, while the Commission did solicit comments in its Further Fin/Syn NPRM on the effect of fin/syn reform on PTAR,<sup>22</sup> it explicitly and repeatedly declined to use that proceeding as a vehicle for considering changes in the operation of PTAR itself. Thus, while the Commission exempted "emerging networks" from its latest version of fin/syn regulations, it refused to exempt such networks from PTAR, citing its threshold decision not to commingle PTAR issues with its fin/syn review.<sup>23</sup> In addition, citing its

---

<sup>20</sup> FCC Answer at 9.

<sup>21</sup> "[W]e did not propose, and we shall not, revisit or revise the PTAR in this proceeding." Further Notice of Proposed Rulemaking, MM Docket No. 90-162, 5 FCC Rcd 6463, 6469 (1990) (Further Fin/Syn NPRM). "[The First Media Petition] will be considered in a separate proceeding." Id. at 6471.

<sup>22</sup> Further Fin/Syn NPRM at 6469.

<sup>23</sup> 1993 Fin/Syn Order at 3331 n.132.

intent to separate PTAR from fin/syn, the Commission refused in the fin/syn proceeding to amend PTAR to state explicitly that network-produced first-run syndicated programming would be considered to be network programming for the purpose of the prime time access rule.<sup>24</sup>

"Coordinating" a new PTAR proceeding with the last phase of the fin/syn proceeding would needlessly complicate both proceedings and serve no constructive purpose, particularly since it would involve unnecessary and unwise delay in beginning the process of resolving the straightforward issues involved in repeal of the off-network restriction.

D. The First Amendment Implications Of The Off-Network Restriction Strengthen The Case For Its Repeal.

The Commission has argued to the Court of Appeals that the scope of a new PTAR proceeding should include public interest, marketplace and constitutional considerations.<sup>25</sup> For the reasons stated by Channel 41, Inc. and Hubbard Broadcasting, Inc., CBS agrees that the off-network ban

---

<sup>24</sup> The Commission did, however, reaffirm its earlier "clarification" of PTAR to that effect. Memorandum Opinion and Order, MM Docket No. 90-162, 7 FCC Rcd 380-82 (1991).

<sup>25</sup> FCC Answer at 9.

operates in the current marketplace to impose constitutionally impermissible restraints on speech. As discussed above, however, the arguments for review of PTAR grounded in economics and public policy are powerful and persuasive. We believe they can and should be the primary basis for deregulatory action. PTAR's constitutional implications should be viewed as making such action more urgent, especially with regard to the discrete off-network aspect of the PTAR regulatory scheme which has already been demonstrated to merit quick repeal.

#### E. Conclusion

A substantial factual record supporting repeal of the off-network restriction of §73.658(k) has already been amassed, and the Commission should immediately issue a Notice of Proposed Rulemaking looking toward its repeal. Coordination of such a proceeding with the 1995 fin/syn proceeding would involve unnecessary and unwise delay and serve no constructive purpose.



Respectfully submitted,

CBS INC.

By Ellen Oran Kaden, *per my*  
Ellen Oran Kaden  
51 W. 52 Street  
New York, NY 10019

By Mark W. Johnson  
Mark W. Johnson  
1634 I Street, N.W.  
Washington, D.C. 20006

Its Attorneys

June 14, 1994

CERTIFICATE OF SERVICE

I, Madeline Sapienza, hereby certify that true and correct copies of the foregoing COMMENTS OF CBS INC. were served by First Class United States Mail, postage prepaid, this 14th day of June, 1994, on the following parties:

Carl R. Ramey, Esq.  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

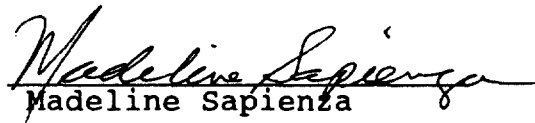
Counsel for Channel 41, Inc.

Nathaniel P. Emmons, Esq.  
Mullin, Rhyne, Emmons and Topel, P.C.  
1000 Connecticut Avenue, N.W.  
Suite 500  
Washington, D.C. 20036

Counsel for First Media, L.P.

Marvin Rosenberg, Esq.  
Fletcher, Heald & Hildreth  
1225 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Counsel for Hubbard Broadcasting, Inc.

  
Madeline Sapienza